Shearer's Foods, Inc. ***and*** **Bakery, Confectionery, Tobacco Workers and Grain Millers Union Local No. 19.** Cases 8–CA–32917, 8–CA–32944, and 8–CA–33188

November 28, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On March 28, 2003, Administrative Law Judge Robert A. Pulcini issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified.[2]

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee David Vaughn and violated Section 8(a)(1) by threatening to close its plant if the Union came in. We agree for the following reasons.

Facts

Vaughn volunteered to become an organizer shortly after the Union began its organizing campaign at the Respondent's Brewster, Ohio plant in the fall of 2001.[3] After work on October 26, Vaughn solicited Kathy Province to sign an authorization card in the employee parking lot. Province, a new employee, declined to sign, then reported Vaughn's actions to Mark Woodruff, the Respondent's vice president of human resources. She identified Vaughn from a photo spread that Woodruff showed her.

One week after Province's first report, she told Woodruff that Vaughn had again solicited her to sign an authorization card. She stated that Vaughn seemed upset and had called Company President Robert Shearer a "fat bastard" and said that Shearer "was going to get his." Province again told Vaughn that she was not interested, and he said, "Okay."

Province made a third report to Woodruff in early November after Vaughn once more solicited her. This time Woodruff requested Province to provide him a written statement. The statement she submitted stated:

> On the week of October 21st I was approached by a employee of Shearers about signing a card to bring the union in for a vote. I told this person I would not sign anything to jeopardize my or my husbands [sic] job. He kept telling me other people signed and that we would all be protected and that Shearers would not fire us. To get people to sign these cards he is telling them that Frito-lay owns 64% of Shearers and slandering Bob Shearer every chance he gets. (He told me he was going to take care of that fat bastard.) He asked me about three more times if I would sign a card and I said no and then he asked if I would vote yes when the booths were brought in and I said yes so that he would stop asking me.

After receiving her written statement, Woodruff asked Province to make a statement to two police officers whom he had called to his office.

On November 9, Woodruff called Vaughn into his office and discharged him, reading from a discharge letter he had prepared. The letter said:

> Shearer's Foods, Inc. has terminated your employment effective November 9, 2001, due to your violation of the Shearer's Foods, Inc. Unlawful Harassment policy. Shearer's Foods, Inc. has determined that you substantially harassed associate(s) on or near October 30, 2001, on Shearer's Foods, Inc. property and created an intimidating, hostile or offensive work environment. Your actions are in violation of Federal law, as issued by the Equal Employment Opportunity Commission.

Vaughn reacted to the statement, calling it "bullshit." Woodruff jumped to his feet, slammed the top of the desk, and exclaimed, "This is not open for discussion." He then had Vaughn escorted from the building.

Two police officers, 2 hours later, visited Vaughn's home and told him that he would be arrested if he stepped one foot onto the Respondent's property. They

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We correct par. 1(b) of the judge's recommended Order to delete his inadvertent repetition of the words "desist from." As corrected, par. 1(b) shall state: "Threatening plant closure in the event employees selected the Union as their collective-bargaining representative."

We shall also modify the recommended Order to provide that the Respondent is to notify the Regional Director for Region 8 of the steps it has taken to comply with the Board's Order.

[3] Unless stated otherwise, all dates occurred in 2001.

claimed that Vaughn had harassed and threatened Shearer and harassed Province.

The Respondent held an employee meeting on December 5. Woodruff told the gathered employees that the Union only wanted the employees' money and that it would not do anything for them. He added that if Robert Shearer had his say, he would shut the plant down if the Union came in.

Analysis

We agree with the judge for the reasons set forth in his decision that the Respondent violated Section 8(a)(1) by Woodruff's statement to employees that, if Shearer had his say, he would shut the plant down if the Union came in. We also agree that Vaughn's discharge violated Section 8(a)(3) and (1).

To prove a violation of Section 8(a)(3) and (1) under our decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in the employer's decision. *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996). Once the General Counsel makes a showing of discriminatory motivation by proving the employee's union activity, employer knowledge of the union activity, and animus against the employee's protected conduct,[4] the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB at 1089.

We find that the General Counsel met his burden of proof that Vaughn's protected activity was a motivating factor in his discharge. At the time of the discharge, Vaughn had distributed union authorization cards after work in the employee parking lot on several recent occasions. The Respondent knew that Vaughn was engaged in this protected activity by Province's reports to Woodruff and her identification of Vaughn as the employee soliciting the cards.

The Respondent displayed its animus against employees' Section 7 activities when its vice president, Mark Woodruff, told employees at the December 5 employee meeting: "[I]f Robert Shearer had his say, the plant would shut down if the Union came in." The manner in which the Respondent carried out Vaughn's discharge also reflected animus. In contrast to the Respondent's discharge of Province,[5] the Respondent discharged Vaughn without an investigation of the complaint against him and without giving Vaughn an opportunity to respond. *R&S Truck Body Co.*, 333 NLRB 330, 333, 336 (2001)(discharges of Blevins, Kendrick, and Wiley). That Vaughn's prounion activity was a motivating factor in his discharge is shown by the fact that Woodruff, who communicated Shearer's threat to employees, is also the person who discharged Vaughn. In sum, the General Counsel met his burden of proving that Vaughn's protected activity was a motivating factor in his discharge.

We further find that the Respondent failed to prove that it would have discharged Vaughn even in the absence of his protected activity. The Respondent contends that it discharged Vaughn because of threats he allegedly made against President Shearer. The judge found, however, that Province's conflicting testimony was insufficient to prove that Vaughn threatened Shearer. "Province's differing versions of what [Vaughn] supposedly said makes it impossible to know what those comments actually were." Slip op. at 4, fn. 12.[6]

Further, the Respondent's discharge letter to Vaughn never mentioned threats against President Shearer as a reason for Vaughn's discharge. Rather, the discharge letter stated only that Vaughn "harassed associate(s)" and "created an intimidating, hostile or offensive work environment."

[4] *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Member Schaumber notes that the test established in *Wright Line* was a causation test under which the General Counsel must prove by a preponderance of the evidence that the employee's protected activity was a substantial or *motivating* factor for the adverse employment action. The Board, administrative law judges, and circuit courts of appeals have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as a fourth element the necessity for there to be a causal nexus between the union animus (i.e., Sec. 7 animus) and the adverse employment action. See, e.g., *American Gardens Management Co.*, 338 NLRB No. 76, slip op. at 2 (2002). Member Schaumber agrees with this addition to the formulation. The existence of protected activity, employer knowledge of the same, and animus (i.e., Sec. 7 animus) may not, standing alone, provide the causal nexus sufficient to conclude that the protected activity was a motivating factor for the adverse employment action. For example, the 8(a)(1) conduct of a supervisor, while imputed to the employer, may have no relation to adverse employment action taken by another supervisor against an employee who happened to be engaged in Sec. 7 activities. Member Schaumber believes it would be preferable in the near future for the Board to adopt and thereafter consistently apply a single statement of the elements of proof, but it is not necessary to address the issue here in deciding that the General Counsel has met his burden.

[5] Some months after Vaughn's discharge, the Respondent discharged Province following an investigation concerning her harassment of another employee.

[6] Member Walsh finds that Vaughn's statements about Shearer were not unprotected activity under any version of Province's description of Vaughn's statements about Shearer.

We, therefore, like the judge, reject the Respondent's argument that it would have discharged Vaughn even in the absence of his protected activity.

Accordingly, since the General Counsel satisfied his burden of proving by a preponderance of the evidence that Vaughn's protected conduct was a motivating factor in the Respondent's decision to discharge him and the Respondent failed to prove that it would have discharged Vaughn in the absence of his protected conduct, we agree with the judge that the Respondent's discharge of Vaughn violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Shearer's Foods, Inc., Brewster, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) Threatening plant closure in the event employees selected the Union as their collective-bargaining representative."

2. Insert the following as paragraph 2(g).

"(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

Dated, Washington, D.C. November 28, 2003

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Nancy Recko, Esq., for the General Counsel.
Roger D. Meade, Esq. (Littler Mendelson), of Washington, D.C., for the Respondent.
Richard Ross, Esq. (Mazanec, Raskin & Ryder Co., LPA), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. PULCINI, Administrative Law Judge. This case was tried in Canton, Ohio, on September 17, 2002. The charge in Case 8–CA–32017 was filed on November 13, 2001.[1] The charge in Case 8–CA–32944 was filed on November 27, 2001, and amended on December 6, 2001. The charge in Case 8–CA–33188 was filed on February 27, 2002. An order consolidating these cases and complaint then issued on March 28, 2002, alleging, inter alia, that Shearer's Foods, Inc. (the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), by discharging employee David Vaughn in retaliation for his activities on behalf of Bakery, Confectionery, Tobacco Workers and Grain Millers Union Local 19 (the Union). It further alleges that the Respondent violated Section 8(a)(1) of the Act by interrogating an employee concerning union activity; by promising benefits in exchange for information about the union activity of another employee; and, finally, by threatening employees with plant closure in the event the employees selected the Union as their collective-bargaining representative.[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed,[3] I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, manufactures and distributes snack foods at its facility in Brewster, Ohio, where it annually ships to and receives from points directly outside of the State of Ohio goods valued in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ISSUES

Whether the Respondent discriminatorily discharged employee David Vaughn on November 9, 2001, because of his activities on behalf of the Union.

Whether Respondent interrogated an employee about the Union and then promised benefits in exchange for information about it.

Whether Respondent threatened employees with plant closure in the event the employees selected the Union as their collective-bargaining representative.

III. ALLEGED UNFAIR LABOR PRACTICES

The Respondent manufactures snack foods, employing approximately 300 workers at its Brewster, Ohio facility. In the fall of 2001, the Union began a campaign to organize the workers at the Respondent's facility.[4] In mid-October, David Vaughn, a second-shift sanitation worker, called the Union,

[1] All dates are 2001 unless otherwise indicated.
[2] The General Counsel withdrew par. 6 of the complaint at the outset of the hearing. Thus, any issues relating to that allegation are not before me.
[3] The General Counsel's unopposed motion to correct the transcript made in its brief is granted. P. 1 is admitted into evidence as GC Exh. 11.
[4] The extent of this campaign and details about it are unknown in this record.

asking to become an organizer. Vaughn spoke to union official Bob Mitchell, receiving literature, authorization cards, and instructions on distribution. He testified that he began his activity on or about October 26 in the employee parking lot. He gathered 10 cards in this foray. One employee approached was Kathy Province, a probationary new hire, on her way into work. She rebuffed the solicitation and then shortly after reported it to Mark Woodruff, vice president of human resources. She told Woodruff she did not want to lose her job and felt harassed. She told him she did not know the name of the person who approached her. Province said Woodruff had a card file on his desk containing pictures of employees. He showed her a picture he selected from her description. She identified Vaughn.[5] A week or so later, Vaughn approached Province again in the parking lot. Province testified Vaughn seemed upset about something that happened on his shift. He told her he wanted to get a union started. He again asked her to sign a card. She said she told him that she would not sign. Vaughn told her, "[O]kay."

Province again went to Woodruff within a day or so of this second solicitation. She testified, "I had told him that he asked me again about the Union and asked me to sign a card; that he called Bob Shearer a fat bastard. He said he (Shearer) was going to get his. Whatever he meant by that. I don't know. That he was upset."

Vaughn solicited Province one more time in early November. Once again, Province reported the events to Woodruff.[6] This time, Woodruff called Province back and asked her to write out a statement about Vaughn and, as she described, his "asking me about signing things," and bring it to Woodruff's office. Province gave Woodruff a statement that same day when she reported to work at 3:30 p.m.[7] Later that shift, Woodruff called Province into his office. Two police officers were with Woodruff as he asked her to write out another statement on a police form. As she did this, Woodruff told her Vaughn was fired.

Woodruff said the decision to discharge Vaughn was his alone. He stated that he made his decision on November 9, based on company policy set out in an employee handbook.[8] He fired Vaughn for threatening Robert (Bob) Shearer, the Respondent's president.[9] Woodruff, however, recalled only the one meeting with Province on November 9.[10] The employee handbook states immediate termination will result for "[s]triking, assaulting, fighting, threatening, intimidating, coercing or interfering with any person on Shearer's premises at any time." Woodruff said Vaughn crossed three "thresholds" with his conduct, but only the threat against Shearer warranted disciplinary action.[11]

Woodruff summoned Vaughn into his office on November 9. Jason Hall, Vaughn's immediate supervisor, was present. As Vaughn took a seat, Woodruff, seated at his desk, read him a discharge letter. Its body read:

> Shearer's Foods, Inc has terminated your employment effective November 9, 2001, due to violation of the Shearer's Foods, Inc. Unlawful Harassment policy. Shearer's Foods, Inc. has determined that you substantially harassed associate(s) on or near October 30, 2001, on Shearer's Foods, Inc. property and created an intimidating, hostile or offensive work environment. Your actions are in violation of Federal law, as issued by Equal Employment Opportunity Commission.
>
> Your Action has resulted in the accumulation of eight (8) points on your record. The Shearer's Foods, Inc. Associate Handbook states that an associate will be terminated if eight (8) points are accumulated on record.

Vaughn reacted angrily to the statement, yelling that it was "bullshit." Woodruff jumped to his feet and slammed the top of his desk saying, "This is not open for discussion." He asked Hall to escort Vaughn out of the building. Vaughn went home and was home about an hour when a knock at his door revealed two policemen representing his township and Shearer's. They told Vaughn that a warrant had been issued for his arrest if he stepped one foot onto Shearer's property. They also told him that he harassed and threatened Shearer. Vaughn denied the allegations.[12]

The Respondent's policies include in its employee's handbook a section titled "OUR POSITION REGARDING LABOR UNIONS." It states, inter alia, "Because of our prominence locally and in the snack food industry, unions will periodically approach you. We do not believe that a labor union is in the

[5] Woodruff testified that he had no recollection of this event.

[6] The record is muddled as to how Province reported this solicitation i.e., whether she did it in person or on the phone.

[7] This written statement differs from Province's testimony in this relevant part concerning Bob Shearer. It states, "He (Vaughn) is telling them that Frito-Lay owns 64% of Shearer's and slandering Bob Shearer every chance he gets. (He told me he was going to take care of that fat bastard.)"

[8] Respondent has an extensive policy concerning harassment, clearly aimed at racial, sexual, and similar types of behavior. Respondent also has an elaborate scheme of prohibited activities with a gradation of demerits that it calls a point system. Eight points is grounds for termination and is reaped by certain misconduct.

[9] Woodruff said that Vaughn committed a number of disciplinary acts by harassing an employee (Province) in his card solicitation of her, and in the comments attributed to him by Province. But, he said, the threat to Shearer prompted his actions.

[10] Woodruff's testimony on this important issue of when he first knew of Provinces' complaints about Vaughn is confusing in the record. Of the two versions, his and Provinces, I credit her account as consistent and less confused. Woodruff, on the other hand was evasive in his testimony and erratic in his rendition of events. For example, he never seemed able to recall his first knowledge of Vaughn's union activity or Province's first complaints about it.

[11] The other thresholds involved an alleged improper sexual remark made by Vaughn in a conversation with some employees in April in which he was a mere participant. Respondent did not discipline or assess "points" for this. The other threshold was the solicitation of Province in October. Woodruff described this as "strong arming to get her to sign a card."

[12] Vaughn denied making the comments attributed to him by Province as well. His demeanor while testifying was pugnacious and edgy. His denials, thus, rang hollow in their expression. It is likely that he did comment despairingly about Shearer to Province in some fashion. However, Province's differing versions of what he supposedly said makes it impossible to know what those comments actually were.

best interest of the Company or our associates. Therefore, we will oppose a union by all legal means. If you are asked by a union to sign an authorization card, we will ask you to refuse to sign it."

On November 28, Douglas Books, a production/sanitation worker, was called into a meeting with two supervisors, Chris Hammond and Rocky Fraley. Douglas contends Fraley asked if he was aware of the union campaign. Hammond, Douglas said, told him that if he knew anything, or if he knew who was trying to get a union started or who had been signing union cards, he would give him a raise. Books said he knew nothing and, in his account, both Hammond and Fraley then told him that he had not been doing his job duties well for some weeks and that he had 1 week to improve or he would be fired. Both Hammond and Fraley denied interrogating Books. Both said that Books' work was in issue.[13]

On December 5, the Respondent held an employee meeting to discuss problems, solutions, and improvements to make. The record is unclear as to exactly how many employees were present. Such meetings are a normal part of the Respondent's operation. During the meeting, Woodruff came into the room, sat down, and observed for a time. At the conclusion of business, Woodruff rose and spoke to the gathering, asking them how they were doing and throwing the meeting open to questions. According to two former employee witnesses, Woodruff fielded a question about union campaign literature and answered it with a description about how the Respondent intended to deal with the union campaign.[14] He told them that all the Union wanted was their money and it would not do anything for them. He said if the Union came in, they would not even be able to say hello to him. He told them that if Robert Shearer had a say in the matter, he would shut down the plant if a union ever did come in and everyone would be out of a job. Woodruff denied that he said anything about plant closure at this meeting. He said when he called for questions, no one spoke.[15]

The Respondent discharged Kathy Province on May 22, 2002, for harassment of another employee. Her behavior involved the purported use of foul language and unwanted touching of another employee. Jeffrey Lambert, Woodruff's successor, fired her.[16] Lambert testified that he applied the company policy prohibiting harassment, as did Woodruff.[17] Lambert, in contrast to Woodruff's methodology, first suspended Province while the facts were investigated, conducted an investigation, and then took action.

IV. DISCUSSION AND ANALYSIS

A. Vaughn's Discharge

Analysis of Vaughn's discharge revolves around the Respondent's motivation in terminating him. The Board has described the process for analysis in such cases. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). *Wright Line* and its many progeny require the General Counsel to present a prima facie case that animus towards protected activity motivated the employer's actions. Proofs of protected activity such as the employer's knowledge of it, along with animus, are elements in this complicated matrix. If the General Counsel is successful in meeting these elements of proof, the burden then shifts to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct. *Naomi Knitting Plant*, 328 NLRB 1279 (1999); *Manno Electric, Inc.*, 321 NLRB 278 fn. 12 (1996).

The Respondent knew of Vaughn's union activity within a short time of it. Province reported to Woodruff what she described as "harassment." Woodruff's statements about this were erratic, imprecise, and strained credulity. He disputed Province's account of her reportage of Vaughn's activity.[18] The Respondent is a hoist on its petard here. The very conduct it disciplines Vaughn for is inexorably intertwined with the protected activity of card solicitation. Moreover, Woodruff's conduct regarding Vaughn reflected a zeal and earnestness to get rid of Vaughn unjustified by the facts. For example, Province's report of the alleged threat varied in its written form from her oral accounts to Woodruff; yet, he ignored the contradictions. Instead, he leapt to the slightest suggestion of impropriety, however uncertain, to rid the Respondent of Vaughn, a known organizer. In so doing, Woodruff responded to the implications of the Respondent's policy on unions set out in its personnel policies.[19]

The Respondent did adopt a careful method of dealing with harassment cases after the fact of the union campaign. It is described in this record by Lambert, his successor.[20] I also note that Woodruff did not stop at the mere discharge of Vaughn, but used his knowledge of the police to carry the insult

[13] Books' account of this event was a disjointed affair. He seemed tenuous in his account and unsure of the event. Hammond and Fraley's testimony, on the other hand, was certain and precise in their individual renditions. They convinced me that their versions of this encounter are more plausible and credible. I also note that Books admitted to having work problems and walking off the job without permission and having indifferent relationship with his bosses.

[14] These employees are Duane Books, the brother of Douglas, and a Todd Gayheart. Both Books and Gayheart left Respondent's employ voluntarily after these events in issue.

[15] Books' and Gayheart's accounts were straightforward and convincing. Woodruff's denial, on the other hand, was initially hesitant. He then said in an earlier meeting elsewhere, an employee asked about Respondent's plant closure intentions. Woodruff testified he simply answered that question "No" and then passed on this same information at the meeting in question. In comparing these accounts, Woodruff's version smacks of pure spontaneous improvisation. I place no reliance in it.

[16] Woodruff had moved on his employment elsewhere.

[17] Province's discharge ironically is the only other discharge case available in this record for comparison of method and motive.

[18] No denial or explanation was ever offered regarding the photograph of Vaughn that Woodruff produced for Province. As I stated previously, I credit Province on this matter.

[19] I do not find that this policy rises to the level of unlawfulness. I do believe, however, that it was a predicate to Woodruff's actions as being "in the best interests of the company" to keep a union out of it.

[20] A suspension, followed by a considered inquiry that allowed an explanation by the accused would have colored the action against Vaughn with some legitimacy.

of removal one step further.[21] Thus, the General Counsel has made out a prima facie case of animus and hostility sufficient to shift the burden of proof to the Respondent. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

The Respondent fails to meet the shifted burden of showing its actions would have taken place absent the protected activity. This burden is only met by the preponderance of the evidence. *Peter Vitalie Co.*, 310 NLRB 865 (1993). The Respondent's entire case on Vaughn rests on Woodruff's acts. I found him incredible and untrustworthy as a witness. Moreover, there is no past practice to show consistency in the application of discharge rules. The only other discharge in evidence record demonstrates an entirely different methodology of dealing with a problem employee, only remarkable because it is reasonable, logical, demonstrating fair dealing. None of these attributes apply to Woodruff's actions against Vaughn. Accordingly, I infer the true motive in firing Vaughn is his union activity, which violates Section 8(a)(1) and (3) of the Act. See *Williams Contracting*, 309 NLRB 433 (1992).

B. Books' Interrogation

The circumstances surrounding the Books' alleged interrogation by Supervisor Hammond do not play out in favor of the General Counsel's case. Books' version of events was inconsistent and confused, as stated above. The Respondent offered a credible alternative in the testimony of its supervisors, which I accept. I recommend this allegation be dismissed.

C. Woodruff's Threat of Plant Closure

Woodruff denied the context of the comments attributed to him by witnesses Douglas Books and Todd Gayheart. I credited their versions, supra, and found Woodruff's denial ringing hollow. The generally accepted test to determine whether statements made by an employer violate Section 8(a)(1) of the Act is whether the employer engaged in conduct which reasonably tends to interfere, restrain, and coerce employees in the free exercise of rights under the Act. *Williamhouse of California, Inc.*, 317 NLRB 699, 713 (1995). Woodruff's statements that Robert Shearer would close the plant if a union came in and, if he did not shut down the plant, it would not exist the way it did classically violated Section 8(a)(1). See *Tellepsen Pipeline Services Co.*, 335 NLRB 1232 (2001), and cases cited therein.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

By discharging David Vaughn, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

By threatening to close the plant if the Union came in, the Respondent violated Section 8(a)(1) of the Act.

Except as found above, the Respondent has not engaged in any other unfair labor practices.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

The Respondent, Shearer's Foods, Inc., Canton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Bakery, Confectionery, Tobacco Workers and Grain Millers Union Local 19, or any other union.

(b) Desist from threatening plant closure in the event employees selected the Union as their collective-bargaining representative.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer David Vaughn full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make David Vaughn whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

[21] Woodruff made much in testifying of his police officer background. From this background, he curiously said there is no need to confront an accused with alleged acts, since only a denial will ensue. However, it is clear that he used his knowledge of police procedure to Harry Vaughn at his home insuring with a police complaint that Vaughn would not darken the doorstep of Respondent again, for any reason, including engaging in lawful activity.

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Within 14 days from the date of this Order, notify all police departments and authorities involved in the Respondent's discharge of David Vaughn and/or the investigation of charges filed by the Respondent against David Vaughn that the Board has found Vaughn's discharge unlawfully motivated, and within 3 days thereafter withdraw all charges and complaints filed against David Vaughn at the time of his unlawful discharge from the aforesaid police departments and authorities.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Canton, Ohio, copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 9, 2001.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 27, 2003

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Bakery, Confectionery, Tobacco Workers and Grain Millers Union Local 19, or any other union.

WE WILL NOT threaten employees with plant closure should they select Bakery, Confectionery, Tobacco Workers and Grain Millers Union Local 19, or any other union, as their collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer David Vaughn full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make David Vaughn whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of David Vaughn, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL appropriately notify all police departments and authorities where we filed complaints against David Vaughn within 14 days from the date of the Board's Order that we unlawfully discharged him, and WE WILL, within 3 days thereafter withdraw any and all complaints made with these departments and authorities against Vaughn arising out of our discharging him.

SHEARER'S FOODS, INC.